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# COMMENTS

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## CONSTITUTIONAL LAW

### CIVIL RIGHTS, PROPERTY, AND THE SUPREME COURT

Can it be that in its decisions upon issues of civil rights the Supreme Court has been less moved by a consideration of those rights alone than by the accidental presence of a property right? It would seem that the latter has definitely been a qualifying factor, and consequently that the protection accorded to individual civil rights has been materially more widespread where these rights have been allied in interest with substantial property rights than where they have not.

For the fifty years which followed *The Slaughterhouse Cases*,<sup>1</sup> the Supreme Court was alert to strike down state interferences with individual property rights as in violation of the due process clause of the Fourteenth Amendment. Thus the state was held without power to deny the right of an employer to discriminate against a worker for union activities,<sup>2</sup> to interfere with the right of a man to conduct a private business,<sup>3</sup> or with the freedom of contract.<sup>4</sup> Yet all this time not a single *civil* right, save only the right to move from state to state,<sup>5</sup> was given a similar protection. This state of affairs so disturbed Mr. Justice Brandeis that it moved him to declare in his dissent to *Gilbert v. Minnesota*<sup>6</sup> that it was impossible of belief "that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property". Indeed Mr. Justice Brandeis, along with Mr. Justice Harlan,<sup>7</sup> would protect the freedom of speech as a privilege and immunity of a citizen of the United States, thus flying in the face of a contrary doctrine settled by the court since *The Slaughterhouse Cases*.<sup>8</sup>

The great war and its accompanying hysteria brought forth the Espionage Act.<sup>9</sup> This raised the question of how far Congress might go in limiting the fundamental liberty of free speech. The court's first

<sup>1</sup> 16 Wall (U.S.) 36, 21 Law Ed. 394 (1873).

<sup>2</sup> *Coppage v. Kansas*, 236 U.S. 1, 59 L. Ed. 441, 35 Sup. Ct. 240 (1915).

<sup>3</sup> *Adams v. Tanner*, 244 U.S. 590, 61 L. Ed. 1336, 37 Sup. Ct. 662 (1917).

<sup>4</sup> *Allgeyer v. Louisiana*, 165 U.S. 578, 41 L. Ed. 832, 17 Sup. Ct. 427 (1897).

<sup>5</sup> *Williams v. Fears*, 179 U.S. 270, 45 L. Ed. 186, 21 Sup. Ct. 128 (1900).

<sup>6</sup> 254 U.S. 325, 65 L. Ed. 287, 41 Sup. Ct. 125 (1920).

<sup>7</sup> Dissent to *Patterson v. Colorado*, 205 U.S. 454, 51 L. Ed. 879, 27 Sup. Ct. 556 (1907).

<sup>8</sup> *Supra*, note 1.

pronouncement came in *Schenck v. United States*<sup>10</sup> where the test, since styled the "Holmes test" was made "whether the words are used in such circumstances and are of such a nature as to create a clear and present danger \* \* \* of the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." This test immediately became the subject of much adverse criticism and seven days later the court affirmed the judgment of a conviction returned under a jury charge which required only that the acts have a "dangerous tendency".<sup>11</sup> In this form it was reaffirmed in *Abrams v. United States*,<sup>12</sup> *Schaefer v. United States*,<sup>13</sup> and *Pierce v. United States*,<sup>14</sup> but these were cases arising under a statute prohibiting certain enumerated acts and utterances, whereas the *Schenck* case was decided under a statute "general in the description of the mischief to be remedied". Consequently the argument has been made that the Holmes test was not intended to be applied to the latter type of legislation.

The various state criminal syndicalist acts which have given rise to most of the recent civil rights litigation were drafted after the general model of the federal statute involved in the *Abrams* and *Pierce* cases.<sup>15</sup> They presuppose that under all circumstances the state has inherent power to suppress the advocacy of its own overthrow even though such advocacy, if unrestrained, will not necessarily result in the evil sought to be avoided. Standing foremost among such cases, and following quite naturally in the wake of the *Abrams*, *Schaefer*, and *Pierce* cases<sup>16</sup> is the Supreme Court decision in *Gitlow v. New York*.<sup>17</sup> There the court held that what constitutes a substantive evil may be defined by the state legislature, and that if such legislation be reasonably connected with the general welfare, its finding will not be open to question even though the danger from the specific act for which the party is accused is distant and remote. Thus the implied legislative finding of general danger in that case removed the necessity for proof of danger in the individual act in controversy.

The court stepped down from this position in *Fiske v. Kansas*<sup>18</sup> to the extent of requiring that such statutes be not arbitrarily applied. In *Whitney v. California*<sup>19</sup> Mr. Justice Brandeis, in his concurring opinion,

<sup>9</sup> Chapter 30, 40 Statutes 217 (1917).

<sup>10</sup> 249 U.S. 47, 63 L. Ed. 470, 39 Sup. Ct. 247 (1919).

<sup>11</sup> *Debs v. U. S.*, 249 U.S. 211, 63 L. Ed. 566, 39 Sup. Ct. 252 (1919).

<sup>12</sup> 250 U.S. 616, 63 L. Ed. 1173, 40 Sup. Ct. 17 (1919).

<sup>13</sup> 251 U.S. 466, 64 L. Ed. 360, 40 Sup. Ct. 259 (1919).

<sup>14</sup> 252 U.S. 239, 64 L. Ed. 542, 40 Sup. Ct. 205 (1920).

<sup>15</sup> *Supra*, notes 12 and 14.

<sup>16</sup> *Supra*, notes 12, 13, and 14.

<sup>17</sup> 268 U.S. 652, 69 L. Ed. 1138, 45 Sup. Ct. 625 (1925).

<sup>18</sup> 274 U.S. 380, 71 L. Ed. 1108, 47 Sup. Ct. 665 (1926).

<sup>19</sup> 269 U.S. 530, 70 L. Ed. 396, 46 Sup. Ct. 22 (1923).

urged that it be further retreated from to the end that the legislative declaration be considered as no more than presumptive evidence of the fact that the specified conduct does really constitute a serious evil. He further contended, that unless such evil be of such a nature that it will probably result in imminent and serious injury, the suppression of free speech is both unjustified and unconstitutional. This was an adoption of the Holmes view and an application of it to a statute prohibiting certain specific acts and utterances as obnoxious and as adding to the potential injury already present in a general situation of danger. In its construction of statutes prohibiting specific acts the court has steadfastly refused to go to this point, but last year in *Herndon v. Lowry*<sup>20</sup> it did reaffirm the Holmes test and apply it to a state statute which described in general terms this evil sought to be remedied.

Unfavorable, perhaps, to free speech in its immediate holding, the *Gitlow* case really opened up new vistas for those civil rights which are embodied in the first eight amendments to the federal constitution by its *dictum* that free speech and press, being fundamental rights and liberties, are protected from state impairment by the word "liberty" in the due process clause of the Fourteenth Amendment. At last the court had announced itself possessed of the jurisdiction to review cases where the state had overstepped its bounds in the exercise of its police power, to the detriment of man's fundamental personal liberties. Affirmed in the *Whitney* case this jurisdiction was first exercised to overturn a state statute in the "red flag" case<sup>21</sup> where the court held a state prohibition against wholly peaceful opposition to organized government to be a violation of the individual liberty protected by the Fourteenth Amendment.

Brought under federal protection along with freedom of speech by the *dictum* in the *Gitlow* case, freedom of the press was accorded a position of even greater security by *Near v. Minnesota*.<sup>22</sup> Handed down a scant two weeks after the rather narrow decision in the *Stromberg* case,<sup>23</sup> this opinion, written by Mr. Justice Hughes, took up where the latter case left off and proceeded to carry the torch for liberty at a much faster gait. In contrast to all the earlier discussions of personal liberty, this opinion has a broad and confident tone and gives sweeping protection to the liberty at issue. Specifically, the case holds that the due process clause of the Fourteenth Amendment forbids the states to impose prior restraints upon publication. A distinction exists between the issue pre-

<sup>20</sup> 301 U.S. 242, 81 L. Ed. 1066, 57 Sup. Ct. 732 (1937).

<sup>21</sup> *Stromberg v. California*, 283 U.S. 359, 75 L. Ed. 1117, 51 Sup. Ct. 532 (1931).

<sup>22</sup> 283 U.S. 697, 75 L. Ed. 1357, 51 Sup. Ct. 625 (1931).

<sup>23</sup> *Supra*, note 21.

sented by this case and the speech cases, however. In the latter the court has to deal with an utterance made and completed. There the freedom has already been exercised, whereas here the question is whether or not the publication may be suppressed before it can gain a hearing. Thus the necessary effect of the decision is that the state cannot *prevent* the abuse of the freedom of the press although it is not denied the power to *punish* it after its commission.

Five years later, by declaring invalid as in violation of the due process clause of the Fourteenth Amendment a state tax levied solely upon the newspaper and periodical industry, the court gave further protection to this freedom.<sup>24</sup> Looking through the announced purpose of the act, the court found the Huey Long machine at work, and again laid the ghost of state censorship, represented here by a tax, in another opinion both broad and bold. Here too there was no attempt to narrow the discussion to the precise points of the decision. Indeed a *dictum* in the case is capable of the interpretation that all the rights protected by the first eight amendments against federal encroachment are likewise safeguarded from state invasion by the due process clause of the Fourteenth Amendment. This sweeping opinion was written by Mr. Justice Sutherland.

In the interval between the two press cases indications of a more liberal trend were not wanting elsewhere and additional civil rights were brought within the protection of the Fourteenth Amendment. Thus in 1932 it was held that the failure of a state court to appoint counsel for an accused was a denial of due process since the circumstances showed such appointment to be "essential to the substance of a hearing".<sup>25</sup> In 1934 religious freedom also entered the protective fold of due process by way of *dictum*,<sup>26</sup> and the following year saw the conviction of a Scottsboro defendant reversed because the systematic exclusion of Negroes from the juries amounted to a denial of his constitutional right to the equal protection of the laws.<sup>27</sup>

In keeping with this tendency it was fitting that the right peaceably to assemble be accorded protection similar to that given speech and the press. Opportunity was presented early in 1937 by the case of *DeJonge v. Oregon*<sup>28</sup> and the court, speaking unanimously through Mr. Justice

<sup>24</sup> *Grosjean v. Amer. Press Co.*, 297 U.S. 233, 80 L. Ed. 660, 56 Sup. Ct. 444 (1936).

<sup>25</sup> *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 Sup. Ct. 55 (1932).

<sup>26</sup> *Hamilton v. Board of Regents*, 293 U.S. 245, 79 L. Ed. 343, 55 Sup. Ct. 197 (1934).

<sup>27</sup> *North v. Alabama*, 294 U.S. 587, 79 L. Ed. 1074, 55 Sup. Ct. 579 (1935).

<sup>28</sup> 299 U.S. 353, 81 L. Ed. 278, 57 Sup. Ct. 255 (1936). The case is annotated in 50 Harv. L. Rev. 689, 15 Tex. L. Rev. 373, 37 Col. L. Rev. 857, 25 Georgetown L. Rev. 736, 25 Calif. L. Rev. 496, 5 Geo. Wash. L. Rev. 911, 16 Ore. L. Rev. 278, 35 Mich. L. Rev. 1171, 85 Un. of Pa. L. Rev. 532, 46 Yale L. Jour. 862, 4 Univ. of Chi. 489, 22 Cor. L. Quar. 388, 3 Un. of Pitt. 229, 21 Minn. L. Rev. 744.

Hughes, responded with a strong opinion bringing this right also within the due process clause of the Fourteenth Amendment, saying that "consistently with the federal constitution, peaceable assembly for lawful discussion cannot be made a crime,"<sup>29</sup> thereby overruling on this point a *dictum* in the case of *Presser v. Illinois*.<sup>30</sup> The actual holding of the *DeJonge* case was that participation in a meeting otherwise lawful cannot be made criminal merely because of the auspices under which the assembly was convoked. One indirect effect of it may possibly be the exclusion as irrelevant of the typical evidence of communistic tenets inevitably offered against an admitted member of that party in order to appeal to the prejudice of the jury.

Mention should also be made of the recent decision in *Associated Press v. National Labor Relations Board*.<sup>31</sup> Holding that the newspaper business has no special immunity *ipso facto* from the application of general laws, the court here upheld the provision in the National Labor Relations Act<sup>32</sup> making it an unfair labor practice to discharge an employee for union activities. The employer contended that this restriction on the right of discharge tended to imperil its freedom of speech and press in that the editorial policies could not be given satisfactory expression if their execution were entrusted to writers tainted with a bias opposed to the views of the publisher. Turning to the statute, the court belittled this argument by pointing out that the employment relation might be terminated for "any cause" seeming proper to the employer save only that proscribed by the act, and that "any cause" would indubitably include any trace of prejudice attaching to the writer from his association with the union or its activities. It would seem that the court took a well considered, common sense view of this situation. Microscopic infringements of even the greatest of liberties may well be beneath the notice of the court. Especially is this true when society must otherwise pay for their protection with the sacrifice of projects far more important to it than prevention of the slight injury to the right sought to be protected.

Last of the current chapters is *Herndon v. Lowry*.<sup>33</sup> There, in dusting off the old clear and present danger test and applying it for the first time to a state sedition act<sup>34</sup>, the court adverted favorably to the *Gitlow* case, reapproving it as applied to a specifically defined class of

<sup>29</sup> The Oregon statutes here involved, Oregon Code 1935 Supp. Sec. 14-3110 to 14-3112, were later repealed; Oregon Laws, 1937, c. 362.

<sup>30</sup> 116 U.S. 252, 29 L. Ed. 615, 6 Sup. Ct. 580 (1886).

<sup>31</sup> 301 U.S. 103, 81 L. Ed. 953, 57 Sup. Ct. 650 (1937).

<sup>32</sup> 29 U.S.C.A. 157 (1935).

<sup>33</sup> *Supra*, note 20.

<sup>34</sup> Georgia Penal Code, Chap. 56.

utterances or conduct subject, however, to the qualification that such enactments must find "justification in a reasonable apprehension of danger to organized government. \* \* \* The limitation upon individual liberty must have appropriate relation to the safety of the state." This would seem to have the effect of adopting the Brandeis view that the legislative finding of danger in the act prohibited should be no more than presumptive evidence of that fact.

There nevertheless remain in this field of the law several important *hiatus*. Unanswered are such questions as: What constitutes a peaceable assembly? When does the use of a constitutional privilege become an abuse? At what point is the standard to be fixed for purposes of the clear and present danger test? How remote may such danger be? And what shall constitute a sufficient degree of evil? The last three questions bring out distinctly the objection to the Holmes test as one which is too purely subjective.

Conceivably, the *Gitlow* case is itself an application of it. The legislature there deemed an act having a dangerous tendency to be a threat to the future peace and welfare of the state. Should the court now substitute its judgment for that of the people's duly elected representatives in ascertaining what acts do constitute a substantive danger? Liberals have vigorously condemned the *Gitlow* decision but its immediate effect was merely to bow to the legislative finding of a fact better determinable by the law makers than by the courts.

Also unanswered is the question of whether mere membership in a seditious organization is punishable. The *Stromberg* case<sup>35</sup> seems to suggest that it is so, yet it would seem that this is no more than a passive expression of belief. In this connection civil rights exponents have hailed *Butash v. State*,<sup>36</sup> a recent Indiana decision, as a step in the right direction, but a comparison of this opinion with that written in the famous *Gitlow* case fails to bring out any substantial advance whatever.<sup>37</sup>

An answer to some, if not all of these questions may be found in the traditional process of exclusion and inclusion characterizing all other questions arising under the due process clause. Here the question of its proper limitation presents a conflict between the protection of the individual civil right and the police power of the state.

A critical analysis of this long line of cases involving state invasion of civil rights reveals clearly the probable underlying sympathies of the Supreme Court. The more purely personal liberties have received from the court a much more extensive recognition when aligned with substantial property rights than when presented alone. In the latter situa-

<sup>35</sup> *Supra*, note 21.

<sup>36</sup> ... Ind. ..., 9 N.E. (2d) 88 (1937).

<sup>37</sup> See 268 U.S. 664, 665.

tion the court has tended to crystallize the existing law in its application to them, whereas their appearance in conjunction with property rights has been the signal for the expression of much solicitude by the court for rights both personal and propertied.

Thus in *Allegeyer v. Louisiana*<sup>38</sup> the court, in finding the freedom of contract to be within the protection of the word "liberty" in the due process clause of the Fourteenth Amendment, said that liberty means "not merely the right of a citizen to be free from the mere physical restraint of his person,"<sup>39</sup> but \* \* \* is deemed to embrace the right of a citizen to be free in the enjoyment of all his faculties".

Again, where the civil right, freedom of the press, involved also those substantial property rights incident to the millions of dollars invested in the newspaper business, the court brought that freedom within the protection of the due process clause of the Fourteenth Amendment in two very broad opinions, defending it against both the state police power<sup>40</sup> and taxation power.<sup>41</sup> In each case the court went far out of its way to demonstrate why this liberty should be protected.

Yet even within the newspaper field the court has viewed the issue quite narrowly in the two cases where the question presented related to the subject matter printable in the news columns rather than to the nature of the right to engage in the business itself.<sup>42</sup> Technically, perhaps, the court was sound in each holding.<sup>43</sup> The criticism is directed at the spirit in which the cases appear to have been decided. In other cases where no substantial property interest has been aligned with the civil rights the court has refused to generalize upon the protection to be given them, and has sometimes restricted its decisions to a surprising degree.<sup>44</sup> The *DeJonge* case appears in striking contrast to this general tendency.

<sup>38</sup> *Supra*, note 4.

<sup>39</sup> For an extended discussion of the evolution of the word "liberty" and the "due process clause" of the 14th Amendment see Charles Warren "The New Liberty" 39 Harv. L. Rev. 431 (1926).

<sup>40</sup> *Near v. Minn.*, *supra*, note 22.

<sup>41</sup> See *supra*, note 24.

<sup>42</sup> *Supra*, note 7. Also *Toledo Newspaper Co. v. U. S.*, 247 U.S. 402, 62 L. Ed. 1186, 38 Sup. Ct. 560 (1918).

<sup>43</sup> In *Patterson v. Colo.*, *supra*, note 7, the court held that no federal question was involved, and in *Toledo Newspaper Co. v. U. S.*, *supra*, note 42, that the federal court may punish for contempt a newspaper and its editor when the criticism published had a tendency to impair the administration of justice. Mr. Justice Holmes in his dissent to this decision contended that the publication should first obstruct justice in a particular case before it should be so punishable, saying that a mere impairment of general prestige should not be sufficient.

<sup>44</sup> See *Patterson v. Colo.*, *supra*, note 7. *Stromberg v. Calif.*, *supra*, note 21, and *Fiske v. Kansas*, *supra*, note 18. Compare *Nixon v. Herndon*, 273 U.S. 536, 71 L. Ed. 759, 47 Sup. Ct. 446 (1927); *Powell v. Alabama*, *supra*, note 25, *Norris v. Alabama*, *supra*, note 27.

*Patterson v. Alabama*, 294 U.S. 600, 79 L. Ed. 1082, 55 Sup. Ct. 575 (1935); *Herndon v. Lowry*, *supra*, note 20.

Furthermore, where no accompanying property right existed protection has often been *denied* to the civil right. Thus the state was held to have power to change the manner of preliminary criminal proceedings from indictment to information,<sup>45</sup> to reduce the number of jurors from twelve to eight in a criminal case,<sup>46</sup> to abrogate the right against double jeopardy,<sup>47</sup> the right against self-incrimination,<sup>48</sup> and to levy a tax on the right to vote.<sup>49</sup>

In one other situation the court has been favorable to those more purely civil rights. This is in a small line of decisions, which might be called the "consolation cases," denying protection to the particular right in issue but favorable, in *dicta*, to civil rights in general. Thus in *Twining v. New Jersey*<sup>50</sup> the court proclaimed that some of the rights protected by the first eight amendments might also be safeguarded from state action because their denials would be a denial of due process; in *Palko v. Connecticut*,<sup>51</sup> after a holding along the same general lines, the court made the statement that "the domain of liberty, withdrawn by the Fourteenth Amendment from incroachment by the states, has been enlarged to include liberty of mind as well as action"; and in *Gitlow v. New York* a *dictum* brought freedom of speech and press under federal protection. The role played by the court in such cases is not unlike that of the stern taskmaster occasionally made more sympathetic by twinges of remorse.

The thesis advanced could not be supported by any one of these cases, or by any given group of them, but viewed as a whole the decisions are persuasive of the conclusion that the court has been unduly influenced by the presence or absence of an accompanying property right in determining the degree of protection to be granted civil rights.

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<sup>45</sup> *Hurtado v. California*, 110 U.S. 516, 28 L. Ed. 232, 4 Sup. Ct. 111, Dissent on 292 (1884).

<sup>46</sup> *Maxwell v. Dow*, 176 U.S. 581, 44 L. Ed. 597, 20 Sup. Ct. 448 (1900).

<sup>47</sup> *Palko v. Conn.*, ... U.S. ..., 58 Sup. Ct. 149 (1937).

<sup>48</sup> *Twining v. N. J.*, 211 U.S. 78, 53 L. Ed. 97, 29 Sup. Ct. 14 (1908).

<sup>49</sup> *Breedlove v. Settles*, ... U.S. ..., 58 Sup. Ct. 205 (1937).

<sup>50</sup> *Supra*, note 48.

<sup>51</sup> *Supra*, note 47.